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No._____

In The
Supreme Court of the United States

October Term, 1997

United States of America
ex rel.
Charles M. Millner
Relator

Petitioner,

v.

ITT Aerospace/Communications
Division of ITT Corporation
Incorporated

Respondent.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

Charles M. Millner
Pro Se
7853 West – 600 North
Andrews, Indiana 46702
(219) 344-1666

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QUESTIONS PRESENTED FOR REVIEW

Pro Se Petitioner (Millner) brought suit under the False Claims Act 31 U.S.C. 3729-3733, against Respondent (ITT). The District Court dismissed case under Summary Judgement. Upon appeal, the Appellate Court concluded that Millner was not informed of how to properly respond to a Summary Judgement, but did not remand case back to District Court.

In order to remand the case back to District Court for Jury Trial, why has the Appellate Court....

1. Demanded further proof in a matter that ITT does not contest, thus requiring an unattainable level of proof.

2. Not allowed Millner to use the same document to prove his case that the Court has used to dismiss it.

3. Determined that the Inventor (Millner) was unable to have any personal knowledge of his Invention.

PARTIES TO THE PROCEEDING

The caption of the case contains the names of all the parties to the proceeding.

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PETITION FOR A WRIT OF CERTIORARI

Charles M. Millner, an individual representing himself, respectfully petitions for a Writ of Certiorari to review the judgement of the United States Court of Appeals for the Seventh Circuit.

Millner also requests that the Court take into consideration that I am a pro se litigant with no legal training, and will attempt to follow in all respects, the guidelines listed in the "Rules of the Supreme Court of the United States" that was provided to me.

I am also aware of the overriding emphasis for brevity and clarity in this document, and without knowing exactly what issues the Court considers relevant and those that it does not, this petition may appear to be cumbersome.

OPINIONS BELOW

The opinion and order of the Court of Appeals, (App. 1), is an "Unpublished Order Not To Be Cited Per Circuit Rule 53."

The opinion and and order of the District Court (App.19) is not reported.

JURISDICTION

The judgment of the Court of Appeals (APP. 1) was entered on July 21, 1997, and a Suggestion for Rehearing En Banc (App.58) was denied on August 21, 1997.

STATEMENT

This matter was brought to the District Court's attention by Charles M. Millner, when he filed a complaint with the District Court for the Northern District of Indiana (Fort Wayne Division) January 10, 1994. It concerns alleged acts of fraud under the False Claims Act 31 U.S.C. 3729-3733.

The False Claims involve contracts between the United States Government and the ITT Corporation (Respondent) in producing the combat communication system known as "SINCGARS" (Single Channel Ground/Air Radio System).

The alleged acts of fraud concern the component of the SINCGARS Communication System known as the "Mounting Tray MT-6352" which is the mechanical shock absorbing platform that is bolted to the tracked or wheeled military vehicle. The remainder of the SINCGARS Communication System is then attached to this platform in order to isolate it from the mechanical stress (vibration) that is impacting the vehicle while traversing rough terrain and other forms of mechanical stress experienced in a combat scenario.

Millner was a Senior Test Engineer at the ITT SINCGARS facility that produced this equipment from 1983 to 1991, and was in charge of the test equipment that performed the various production and acceptance tests that were required by the SINCGARS Contract before the Government would accept delivery of these systems.

The SINCGARS Mounting Tray consists mainly of two metal plates separated by four shock isolators. These shock isolators were not able to withstand the mechanical stress (vibration) in what Millner contends was the contractual requirement known as the "Group C Vibration" test, which consisted of 12 hours of "Wheeled" type vibration, and 6 hours of "Tracked" type vibration.

Millner was part of a two man Engineering team that discovered a simple inexpensive solution in 1987, that not only would allow the SINCGARS Mounting Tray shock isolators to endure the "Group C Vibration" test, but three times the amount of mechanical stress (vibration) of the 12 and 6 hour Contract requirement.

The alleged acts of fraud on the part of the ITT Corporation involve the following:

- the concealment of the shock isolator solution for 2 years while negotiating a Government Contract indicating to the Government that the solution was unattainable.

- the manner in which the solution was eventually disclosed to the Government.

- the claim by the ITT Corporation that this 1987 discovery needed additional testing before allowing it to be implemented into production.

- the solicitation and acceptance of Government funds to conduct extended testing for the purpose of providing an estimate that was never forthcoming.

The District Court granted Summary Judgement against Millner due to fact that he did not submit his documents under oath (App. 40), or submit a "Statement of Genuine Issues" (App. 22).

Millner was unaware of how to properly respond to Summary Judgment and informed the District Court in specific language six days after ITT filed its Motion For Summary Judgement as follows…

> "2. That included within these numerous documents, is considerable language that I am not aware of all the ramifications that could materialize, if not properly responded to in my reply brief." (District Court Document No. 80)

The District Court refused to respond in any manner to this request by Millner.

When Millner appealed to the Appellate Court, the Court concurred that...

> "Neither ITT nor the District Court sent an appropriate notice" (App. 14).

This would have normally remanded the case back to the District Court as the Appellate Court states

> "This Circuit has a rule that Pro Se litigants are entitled to notice of the consequences of failing to respond to a summary judgment motion." (App. 13)

However, the Appellate Court affirmed the District Courts Order.

The Appellate Court Order (App.1 to 18) has summarized Millner's complaint into two main issues.

1. Was the "Group C Vibration" exposure that consisted of 12 hours of "Wheeled" and 6 hours of "Tracked" vibration ever a contract requirement, or was it just merely a "proposed" contract requirement?

2. Was the solution that allowed the SINCGARS Mounting Tray to endure the "Group C Vibration" exposure, known as the "Jam Nut Configuration" a "proven" solution, or not?

The following statements contained in the Appellate Court's Order (App.1 to 18) will be the basis of the three "Questions Presented for Review and are as follows

Question No.1:

> "There is no evidence that the government was charged for work which merely duplicated work already performed in 1987 by Rippe and Millner." (App. 13)

Question No.2

> "Millner made two complaints to agencies of the Army. They were investigated and rejected." (App.8)

Question No.3

> "The idea was developed in the summer of 1987 by Dan Rippe and Millner, ITT employee who were testing the SINCGARS units." (App.4)

> "We have found no assertions of material fact to which Millner could have testified on personal knowledge." (App.15)

REASONS FOR GRANTING THE PETITION

A United States court of appeals has entered a decision that has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

I. QUESTION NO. 1

THE APPELLATE COURT STATES THAT ... "THERE IS NO EVIDENCE THAT THE GOVERNMENT WAS CHARGED FOR WORK WHICH MERELY DUPLICATED WORK ALREADY PERFORMED," BUT THE RECORD INDICATES THAT ITT DOES NOT CONTEST THE CHARGING, ONLY THE AMOUNT.

IA. ISSUE

One of the issues that the Appellate Court uses to uphold Summary Judgement is that

> "There is no evidence that the Government was charged for work which merely duplicated work already performed in 1987 by Rippe and Millner." (App. 13)

This particular issue was never a part of the original complaint filed by Millner in 1994. As discovery documents became available, Millner realized that instead of the 1991 Government funded "Taguchi" study being the first study that ITT fraudulently charged the Government for work that was performed by Rippe and Millner in 1987, it was the second such study. The 1989 P31 study was the first.

Millner's attempt to amend the complaint was for the Court to take "Judicial Notice" of the new information contained in the discovery documents (District Court document No.63). The District Court refused to respond in any fashion to this request, and then devoted three pages of this error of dates in its Order (App.34 to 38) granting Summary Judgement, as did the Appellate Court (App.11).

The important issue here is that the Appellate Court has set a "Standard of Proof" that Millner must not only meet, but exceed, not in order to reverse a decision issued after a full trial..., but just to have a trial.

I B. BACKGROUND

The "work" that is referenced by the Appellate Court is one of the efforts known as a "P31" study. Page 18 and 19 of Millner's Reply Brief contains the following

> "ITT indicates that there were a total of 16 "Studies" included in the "P31" program. The Government allotted ITT $614,956.00 (Doc. No.90 Att. No.18 (Bates No. 326 to 332)) to conduct these studies.
>
> The "P31 Study" in question contains 4 categories in the report which are contained on pages 6 through 10 (Doc. No.90 Att. No.22 p.6 to 10 (Bates No. 344 to 348)). Subsection "3.2" entitled "Shock Isolator" addresses the "Jam Nut Configuration" which equates to one forth of the study.
>
> Millner does not have in his possession at this time the dollar figure that ITT charged the Government. However, if each of the 16 studies were equally weighted, it would result in $38,434.75 per study, where one fourth of a "Study" would be equivalent to $9,608.69.

To further emphasize that the Jam Nut Configuration was a significant part of this particular "P31 Study" is the statement found in the "Taguchi Study" on page one, subheading titled "1.3 Background" (Doc. No.90 Att. No.28 p.1 (Bates No.J2534)) where it states the following....

> "The primary concern of the initial mounting tray design study (D.O. 26, Task 31AR) was to incorporate a longer mounting stud and jam nut on the tray isolator to improve vibration performance.

IC. ARGUMENT

Millner contends that in order to meet the Appellate Courts "Standard of Proof" to remand this case back to the District Court for trial, that it would take a full admission under oath from ITT, that would contain in detail the actual dollar amount that it charged, and was then paid, by the Government to ITT.

Millner contends that ITT has already submitted documents to the Court that do not contest that money was charged and received, but only contests the severity of the charges.

Contained on pages 26 and 27 of the "Brief of Defendant-Appellee" filed with the Appellate Court in January 1996 ITT responds to Millners allegations of its charges relating to the P31 study, and attempts to diminish the allegations with the following quotations:

"the mounting tray shock isolators was but one aspect of each of the studies"

"neither focussed or even emphasized the shock isolators"

"The Studies Funded By The Army Addressed A Panoply Of Issues"

"They Did Not Focus Exclusively Or Even Predominately On The Shock Isolators"

"the P31 Study addressed a wide variety of issues"

"that part of the P31 Study that addressed mounting tray issues was not limited to analysis of the mounting tray shock isolators"

"Nor did the section of the P31 Final Study relating to the mounting tray recommendations focus on the shock isolators."

If these were the answers to a question presented during the course of a full trial of "did you, or did you not, charge the Government in a 1989 P31 study for work that was performed in 1987 by Rippe and Millner"... what would a "Reasonable Man" or jury conclude?

This information was already contained in the record, The Appellate Court indicates that this is not enough, if in fact is was part of the Complaint.

II. QUESTION NO. 2

THE APPELLATE COURT STATES THAT "MILLNER MADE TWO COMPLAINTS TO AGENCIES OF THE ARMY. THEY WERE INVESTIGATED AND REJECTED." BUT THE SAME AGENCIES PROVE THE ALLEGATION THAT THE CONTRACTUAL STRESS REQUIREMENTS WERE REDUCED.

IIA. ISSUE

The next issue that the Appellate Court uses to uphold Summary Judgement is that

> "Millner made two complaints to Agencies of the Army. They were investigated and rejected." (APP. 8)

The two Army "Agencies" that the Court is referencing are the "Army Criminal Investigation Command," and the "Defense Contract Management Command."

Nearly half of the Appellate Court Orders relates in one form or another to the issue of weather or not the 12 hours of "Wheeled" vibration and 6 hours of "Tracked" vibration of the "Group C Vibration Exposure" was in fact a "Contractual Obligation." The importance of this is that the SINCGARS Mounting Tray shock isolators could not withstand this exposure and thus would not allow ITT to sell this equipment to the Army.

Millner has contended that it was a Contractual Obligation due to the fact that he was the person that was in charge of the test equipment that subjected the SINCGARS equipment to this test. He was also the individual that programmed the equipment, and in many cases, personally ran the test equipment for this test from 1984 to 1991.

Millner has stated that in 1987 he was given a "Waiver" to reduce the "Group C Vibration Exposure" from 12 to 2 hours of "Wheeled" vibration, and from 6 to 2 hours of "Tracked" vibration. Again, if this "Waiver" which is referenced in Millners original complaint (District Court Document No.1 p.12 par.47), was not issued by the Government, which allowed the temporary reduction of the "Group C Vibration" requirement, ITT would not have been allowed to sell this product to the Government.

I I B. BACKGROUND

Contained on pages 4 and 5 of Millner's "Suggestion For Rehearing In Banc" document is the following....

"IC.ADDITIONAL DOCUMENTATION TO SUPPORT ISSUE I

Page 6 of the Court's order, the Court writes...

"Before beginning this lawsuit Millner made two complaints to agencies of the Army. They were investigated and rejected."

If the Court is using these agencies reports in support of Summery Judgement, the Court should not object to the extraction of additional excerpts from these agencies which are as follows...

Army Criminal Investigation Command report dated March 2. 1992 (Doc. No.88 Att. No.8 P.2 and 3 (Bates No.00033 and 00034)) where starting at the bottom of page 3 in reference to the testing of the shock isolators states....

"After various solutions were tried, it was decided that the problem could not be solved and the government agreed to waive the contractual requirement that they withstand testing of longer duration."

Defense Contract Management Command report dated February 16, 1993 (Doc. No.88 Att. No.6 P.3 (Bates No.000269)) middle of page in reference to testing of shock isolators states...

"CECOM conceded by allowing the contract requirement for longer duration testing to be waived."

Both agencies reference the waiving of "contract requirements."

Millner has provided numerous documentation references to include the "A3013722 Specification' document, that both ITT and Government personnel had to approve, and two references from the same Government Agencies that the Court has used to deny Millner's Appeal.

In addition, Millner has provided sworn testimony from Douglas Doerr, the same individual that the Court references throughout its Order, to substantiate that the 12 hours of "Wheeled" and 6 hours of "Tracked" vibration, was contained in an official document that contained this requirement."

IIC. ARGUMENT

The Court selected these Agencies reports and held them up to the light, as part of its reasons to Affirm the District Courts Order of Summary Judgement. They must have met the Courts criteria for admissibility and relevance in this matter. The authors of these reports must not have been suspect of Rule 56g (Affidavits Made in Bad Faith). The question then becomes that of "Why" does the Court accept one line of these Agencies reports and refuses to consider the next, that states in plain language, proof, of the issue that the Appellate Court dedicates nearly half of its 12 page Order to?

This may be applicable after a full trial, but this is Summary Judgement.

III. QUESTION NO. 3

THE APPELLATE COURT STATES THAT....
"THE IDEA WAS DEVELOPED IN THE SUMMER OF 1987 BY DAN RIPPE AND MILLNER, ITT EMPLOYEES WHO WERE TESTING THE SINCGARS UNITS" BUT THEN STATES ... "WE HAVE FOUND NO ASSERTIONS OF MATERIAL FACT TO WHICH MILLNER COULD HAVE TESTIFIED ON PERSONAL KNOWLEDGE."

IIIA. ISSUE

The final issue for review in which the Appellate Court uses to uphold Summary Judgement is that

> "The idea was developed in the summer of 1987 by Dan Rippe and Millner, ITT employees who were testing the SINCGARS units." (APP.4)

> "We have found no assertions of material fact to which Millner could have testified on personal knowledge."
> (APP. 15)

The reason that these two quotations from the Appellate Courts Order are used, first shows that the Court recognizes that Millner was part of the two man team that that "developed" the solution known as the "Jam Nut Configuration". The second quotation is self explanatory.

This issue deals with weather or not the solution known as the "Jam Nut Configuration" was, or was not, a "Proven" solution.

As in "Question No. 2" nearly half of the Appellate Courts Order that affirms Summary Judgement, relates in one form or another to this issue.

Millner contends that it was a "Proven" solution in that the ITT Engineers that submitted the reports to ITT Management, and the Reports (P31 Study) that ITT submitted to the Government, all reflect that this was a "Proven" solution to the inability of the SINCGARS Mounting Tray to pass the 12 hours of "Wheeled" vibration, and the 6 hours of "Tracked" vibration contained in the "Group C Vibration" contractual requirement.

Only after Millner filed his lawsuit on January 10, 1994, have "Affidavits" and "Depositions" of ITT personnel and the use of an out of context quote from Millners deposition surfaced to indicate that this was "Not" a "Proven Solution".

IIIB. BACKGROUND

Contained on pages 6 and 7 on Millner's "Suggestion For Rehearing In Banc" document is the following

"II. ISSUE 2:
MILLNER CONTENDS THAT THE SOLUTION KNOWN AS THE "JAM NUT CONFIGURATION" WAS A "PROVEN" SOLUTION

ITT's present stance is that the "Jam Nut Configuration" needed further testing. From its conception in 1987 to present day, Millner is unaware of any changes to this 1987 solution, or any further testing from that which was performed by Rippe and Millner in 1987. Again, the "Jam Nut Configuration" only consists of a nut on the end of a bolt to keep the bolt from loosening.

The Court accepts the Doerr deposition, disregards Millner's argument and supporting documents that were generated by ITT Engineers at the time the incidents actually took place, and uses an out of context excerpt from Millner's deposition to uphold the District Courts ruling.

Again, if the Court is agreeing that Pro Se litigant Millner was denied proper disclosure of Rule 56, then either remand the case back to the District Court for a hearing, or treat Millner's argument with the same weight as the Appellee's.

IIA. MILLNER'S DOCUMENTATION PROOF TO SUPPORT ISSUE 2

Contained on pages 9 and 10 of Millner's Reply Brief filed February 1995 states the following.....

"The significant documents are as follows:

- Original report by Rippe (Doc. No.90 Att. No.11 (Bates No. J107)) dated September 1, 1987, states in reference to the Jam Nut Configuration and the use of a stronger loctite adhesive...

  "Both options discussed above have been proven through 36 hours of random vibration."

- Detailed report by Rippe (Doc. No. 90 Att. No.13 (Bates No.J88 to J106)) dated November 20, 1987, states in the "Abstract" of the report (Bates No.J91) referencing the results of the Jam Nut Configuration...

"the average life of the shock isolators will be increased several times in magnitude, under any type of vibration input (sine, random single axis, or multiaxes)."

- P31 Study, which was a Government funded study, and the first time that ITT revealed the Jam Nut Configuration to the Government (Doc. No.90 Att. No.22 (Bates No.336 to 352)) dated August 15, 1989, states under subsection "Shock Isolator" on page 8 (Bates No.346)....

"Two solutions have been identified that will correct the inadvertent rotation of the mounting stud"

"The second solution incorporates a longer mounting stud and a jam nut."

IIIC. ARGUMENT

In this instance, the Appellate Court recognizes Millner as one of two Engineers that developed the "Jam Nut Configuration. Millner was also the individual that oversaw all of the testing in the development and validation of this solution. In fact, there is no record of any further testing of the "Jam Nut Configuration" to the present day.

The Court has ignored three separate documents that were generated by ITT Engineers at the time the incident took place, in which reference the "Jam Nut Configuration" as:

"Proven through 36 hours of random vibration".

"Life of the shock isolators will be increased several times in magnitude".

"Two solutions have been identified".

Instead, the Appellate Court accepts Depositions, and Affidavits generated by ITT personnel that were all generated after Millner filed his suit, and contradict ITT documents obtained in Discovery, to justify its Affirmation of Summary Judgement.

In this instance, the fact that Millner did not submit his evidence under oath, or file a Statement of Genuine Issues is not a factor. The Court indicated in its Order that the Seventh Circuit "has a rule that Pro Se litigants are entitled to respond to a Summary Judgement Motion." In this instance, the Court simply indicates that an "Inventor" cannot testify as to any "personal knowledge" of his "Invention."

CONCLUSION

The three issues that are portrayed in this document are only a fraction of what Millner considers "anomalies," that have occurred throughout this matter.

Throughout this entire matter, Millner has made every attempt to be credible and follow the rules of the Court. To support his allegations, and to counter statements made by the Respondent, Millner has simply relied on intimate personal knowledge, and in the vast majority of these instances, provided documents generated by, and provided to Millner, by the Respondent. More importantly, these documents were generated "at the time that the event actually took place."

After reading the opinions and case law entries concerning Rule 56 in "Federal Practice and Procedure" by Wright, Miller, and Kane, I decided not to quote from it. The reason being is that the vast majority of the quotations would be applicable in Remanding this case back to the District Court for a trial, and that the Court is well aware of the intent of Rule 56.

Contained on pages 5 and 6 of the "Rules of the Supreme Court of the United States, it states in part that the Supreme Court considers issues that

> A United States court of appeals has entered a decision that has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

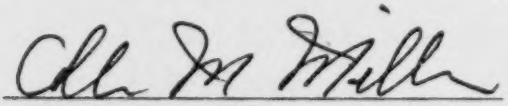
In addition, contained on page 5 of the same document, it also states in part that the Supreme Court considers issues for compelling reasons.

The compelling reason in this matter is the survivability of the most important possession of the men and women of our Armed Forces..... communication.

There are over 75,000 of these SINCGARS systems deployed with our troops throughout the world. Hundreds more are being manufactured and delivered every month. These systems failed repeatedly when subjected to the 12 and 6 hour Group C Vibration exposure which simulated extensive use in a combat scenario. They will fail again at the exact moment when they are needed most.

I strongly believe that this matter falls within these guidelines and therefore request that this petition for a Writ of Certiorari be granted.

Respectfully Submitted



Charles M. Millner
7853 West - 600 North
Andrews, Indiana 46702
(219) 344-1666

Petitioner Pro Se

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
UPUBLISHED ORDER
Chicago, Illinois 60604 NOT
TO BE CITED
Submitted January 29, 1997 PER
CIRCUIT RULE 53
Decided July 21 1997

Before
Hon. THOMAS E. FAIRCHILD, Circuit Judge

Hon. WILLIAM J. BAUER, Circuit Judge

Hon. JOHN L. COFFEY, Circuit Judge

CHARLES M. MILLNER,	) Appeal from the United
	) States District
Plaintiff-Appellant,	) Court for the Northern
	) District of
	) Indiana, Fort Wayne
	) Division.
No. *95-3545*	)
	) No. 94C9
	)
ITT AEROSPACE/	)
COMMUNICATIONS	) William C. Lee, *Judge.*
DIVISION OF ITT	)
CORPORATION,	)
INCORPORATED,	)
Defendant- Appellee.	)

ORDER

Charles Millner brought a *qui tam* action under the False Claims Act ("FCA"), 31 U.S.C. §§ 2729-33, against ITT Aerospace/Communications Division of ITT Corporation ("ITT') Millner's former employer. The United States elected not to take over the action, leaving Millner free to proceed. The court granted ITT's motion for summary judgment. Millner has appealed.

Background

Since 1983, ITT has had contracts with the Army for the development and production of communications equipment for combat vehicles. The equipment involved in this case is called SINCGARS (Single Channel Ground Air Radio System). A unit consists of a radio and a mounting tray. The radio is attached to the top of the tray, and the bottom is to be attached to a vehicle. The tray consists of two metal plates separated by four rubber shock isolators (shock absorbers). Each shock isolator is held between the plates by a bolt which passes through the top plate, through the shock isolator, and through the bottom plate, held in place by a nut. This lawsuit involves the tray and the shock isolators.

After an examination of the briefs and the record, we have concluded that oral argument is unnecessary in this case; accordingly, the appeal is submitted on the briefs and the record. See Fed. R. App. P. 34(a); Cir. R. 34(f).

The specifications initially required that SINCGARS units be subjected to so-called sine vibration testing. In 1986, the Army indicated its desire to change to a more rigorous test. It wanted to subject the units to random vibrations which must be endured for six or twelve hours, depending on the type of vehicle on which the unit would be mounted. Changing the test would require agreement by ITT and the Army and a change in the contract.

In 1987, before agreeing to change the test, ITT conducted its own tests according to the Army's proposed changes and found that the shock isolators in the mounting tray would deteriorate before the six or twelve hours had elapsed. Evidently the shock isolators could survive more than two hours of the random vibration because it was decided that "changing out" the mounting trays after two hours would avoid the problem and permit the other parts of the units to survive the full time. On November 20, 1987, ITT and the Army agreed on the change to random vibration testing except that shock isolators would be changed out after every two hours.

At the core of this lawsuit is an idea for modifying the mounting tray which has been called the Jam Nut Configuration. The idea was developed in the summer of 1987 by Dan Rippe and Millner, ITT employees who were testing the SINCGARS units. ITT points out that three Army personnel were present full time at ITT's plant and had unlimited access, but it has not produced any evidentiary material showing that any Army personnel became aware of the Jam Nut Configuration until August 15, 1989 when it was described in a study called a P31 Study. A critical part of Millner's theory is that ITT deliberately concealed its information about the Jam Nut Configuration from the Army, with a fraudulent purpose so that claims it presented were false or fraudulent.

On September 1, 1987, Mr. Rippe submitted a memorandum to other ITT employees describing "options" which had resulted in isolators surviving 36 hours of random vibration. One of the options was the Jam Nut Configuration. This "method would be to use a longer center bolt (new: 1/4-20 x 1.000) and jam nut combination. With this method loctite (grade A), would be applied only to the jam nut threads leaving the threads inside the pedestal section clean." It was said, "The life and repairability of the isolators can be maximized by a simple change in the assembly process." A cost estimate accompanied the memorandum. Both options were again addressed in a study by Mr. Rippe, dated November 20, 1987.

Douglass Doerr, Program Manager of SINCGARS for ITT explained in a supplemental affidavit that "because SINCGARS contract is a fixed price contract, ITT was unwilling to incorporate the jam nut configuration unless and until the configuration was adequately tested to determine the impact of the configuration on the system from the standpoint of both design and cost. Changing the configuration of the attachment of the shock isolators would have entailed a design change to the mounting tray that would have necessitated complete environmental and reliability (PRAT) testing, specifically focused on the effect of incorporating the jam nut configuration with respect to ballistic shock testing and vibration testing with respect to reliability." Although Millner argues that no further testing was necessary a portion of his deposition seems to concede that full testing had not occurred. When asked about ballistic testing he had performed on the Jam Nut configuration, he noted a possible problem. Then asked, "Would it be fair to say you never got that far in the testing?" he answered, "Correct."

Delivery of SINCGARS units began in January, 1988. An internal ITT memorandum, dated January 15, was entitled "B & P Hours: SINCGARS Mounting Tray Design. It recited

> Because of problems associated with the corrosion of the mounting tray, as well as, the failure of shock isolators in vibration, an overall redesign of the mounting tray is in order. It is our opinion that the government will be very receptive to a complete new mounting tray design to eliminate the possibility of cleansing agent entrapment as well as providing for a new shock isolator as a result of their requirement imposing random vibration on the program.

The memo continued under headings of "Technical Description." "Schedule," and "Cost."

An internal ITT memo dated August 30, 1988 read as follows:

> We have decided not to proceed with the redesign of the mounting tray at this time. After a thorough review by all functions, it did not offer the cost savings we had originally envisioned; and Purchasing now indicates they can successfully procure the current tray in the volume we require.

> This will be one of the candidates for the P31 program as there is significant advantage to the Government in reducing the shock mount change out required with the current design in the field.
>
> There is little doubt the proposed new design would be an improvement in producibility and should be incorporated if we can devise a cost-effective program.

The P31 S1TNCGARS FINAL STUDY REPORT was prepared for the Army by ITT. It was dated 15 September 1989. It addressed sixteen topics, No. 4 being Redesign of SINCGARS Mounting Tray. Report Number 4 was dated August *15,* 1989. It covered a number of possible improvements, including alternative materials and others. The section entitled "Shock Isolator" reflected the alternative changes originally proposed by Rippe in September 1987. The Report recommended redesign of the tray.

On February 19, 1990, the Army wrote ITT identifying three improvements contained in the P31 study and requested an ECP (Engineering Change Proposal) for them. One of the three was the Jam Nut Configuration. According to Doerr's affidavit, a request for an ECP is the first step in producing cost estimate and ultimate contract modification.

On April 24, 1990, ITT employee Fabish wrote P. N. Clark asking that he advise the Contracting Officer that ITT "is not willing to proceed with an ECP for introduction of [the Jam Nut Configuration into production on a fixed price basis until samples are produced and proven in tests."

On July 3, 1990, ITT sent the Army an estimate of $48,481 for time and material for a study which has been referred to as the Taguchi study. A report was issued June 30, 1991. It recommended redesigning the mounting tray to incorporate a stiffener rib and study of shock isolators to determine performance differences between vendors and minimum requirements for use with the stiffer tray. ITT employee Frank Fabish, testified that the government had decided not to order a redesign of the mounting tray or change in the isolators. His handwritten note to that effect is dated 2/10/92. No other documentation of the decision is in the record.

Before beginning this lawsuit Millner made two complaints to agencies of the Army. They were investigated and rejected.

In March 1992 the Army Criminal Investigation Command concluded:

> Information was developed that although ITT Defense Corporation personnel pursued alternatives to lengthen the life expectancy of this part, no viable solution was found and the government did not consider this to be a problem warranting a change in design specifications.

In February 1993 the Defense Contract Management Command concluded:

> CECOM did not consider this [the life expectancy of the mounting tray shock absorber] to be a problem of sufficient magnitude to warrant changing the design specifications. Instead, instructions were issued to units processing this component that the shock absorbers had to be replaced on a regular basis to prevent their failure.

The Millner Claims

The relevant portion of the False Claims Act (31 U.S.C. § 3729) imposes liability for a civil penalty and treble damages on [a]ny person who.. knowingly presents, or causes to be presented to an officer or employee of the United States Government... a false or fraudulent claim for payment or approval.. Millner's complaint (with one exception) does not expressly

identify particular claims for payment or approval presented by ITT, but liberal construction is appropriate. So construed we discern four possible claims.

I.

That it knowingly presented claims for payment for S1NCGARS units, delivered from 1988 to 1991, which were false in that ITT certified the units as meeting contract requirements. (Complaint, paragraph 14).

Summary judgment in favor of ITT was correct because the test requirement had been modified by agreement to permit the change out of the shock isolators after two hours, and the units passed the modified test. That was what the contract required.

II.

That ITT knowingly presented claims for payment for an approval of ITT's making the Taguchi study, September 12, 1990 to June 30, 1991. The claims were allegedly false and fraudulent in that ITT had concealed, up to those dates, its knowledge of the Jam Nut Configuration. (Complaint, Paragraph 13).

Summary judgment in favor of ITT was correct because on August 15, 1989 the P31 report had described the Jam Nut Configuration and in February 1990, well before the Taguchi study, the Army had requested an ECP for it. The idea had been fully disclosed to the Army before funds were sought or the study authorized.

III.

That ITT knowingly presented claims for payment which were false because the units were defective and not capable of sustained performance under operational conditions. (Complaint, Paragraph 15).

Summary judgment in favor of ITT was correct because all units conformed to the contract, including the modified testing agreed to. Moreover ITT employee Robert Jones made an affidavit that he collects Army reports of problems with SINCGARS in the field and they showed no field failures of the mounting tray shock isolators.

Iv

That ITT knowingly presented claims for payment for SINCGARS units which claims were false and fraudulent in that ITT concealed its ability to modify the mounting tray to meet government specifications and quality requirements and significantly increase the useful life of the units, while continuously maintaining the problem could not be solved. (Complaint, Paragraphs 12 and 18).

ITT had no right or duty to modify the mounting tray unilaterally. It might have disclosed the idea of the Jam Nut Configuration to the Army and opened negotiations for making the modification at an appropriate price. This claim would at the least require proof that ITT made representations to the Army which were false and fraudulent because of ITT's possession of the information in the 1987 Rippe memorandum and report. The record contains no evidence of such representations.

Millner argues a different claim, in substance that ITT defrauded the government "When it accepted money for a Government funded 'P31' Study report dated August 15, 1989, in which the information presented as being part of the 1989 'P31' study, contained information that was gathered in an 1987 Engineering investigation." Millner Brief, p.6. See also pp 24 and 25. Millner's complaint did not contain that

claim nor was it ever amended to include it. In any event, the "P3I" Study dealt with sixteen topics, and the topic devoted to redesign of the tray dealt with a number of matters besides shock isolators. There is no evidence that the government was charged for work which merely duplicated work already performed in 1987 by Rippe and Millner.

It does not appear that ITT had previously disclosed the Rippe report and memorandum, but the evidence as a whole would not support a jury finding that claims presented for payment for work on P31 were false or fraudulent. to pro se

Notice To Pro Se Litigant of Procedure in Opposing a Motion for Summary Judgment.

Defendant's brief in support of its motion for summary judgment stated on page 6 that "To defeat a summary judgment motion, the non-moving party must be able to present the court with specific, admissible evidence to demonstrate that a genuine issue of material fact exists and requires trial." This circuit has a rule that pro se litigants are entitled to notice of the consequences of failing to respond to a summary judgment motion. Timms v. Frank, 953 F.2d 281, 285 (7th Cir.), cert denied, 504 U.S. 957 (1992). "LT]his notice should include both the text of Rule 56(e) and a short and plain statement in ordinary English that any factual assertion in the movant's affidavits will be taken as true by the district court unless the non-movant contradicts the movant with counter-affidavits or other documentary evidence." Id.

The sentence quoted from defendant's brief is insufficient and neither ITT nor the district court sent an appropriate notice. Millner had the assistance of appointed counsel from June 29, 1994 until counsel was permitted to withdraw March 20, 1995. Counsel appears to have assisted with discovery. Accordingly, Millner was appearing pro se when the motion for summary judgment was filled August 1, 1995. It is not reversible error, however, to fail to give a Timms notice when it appears beyond doubt that the pro se party can prove no set of facts in support of his claim which would entitle him to relief. Id. at 286.

Millner filed voluminous responses to ITT's brief and to affidavits of ITT employees filed in support of its motion. He attached many ITT documents and portions of depositions, which would have been admissible at trial insofar as relevant, and it is evident that he relies almost entirely on documents to prove his case. In response to ITT' s reply brief in support of its motion he noted ITT's argument that certain documents filed by him were not "notarized or signed under oath." He indicated he was unaware of that requirement and offered "that the contents contained in this document, and all the documents that I have personally submitted to the Court to include the initial filing dated January 10, 1994, will be sworn to upon the instruction from the Court." He indicates on appeal that the district court should have permitted him so to swear. His responses, however, are largely conclusory and argumentative in

nature. Rule 56(b) requires that affidavits opposing summary judgment "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." In our search through these voluminous papers, we have found no assertions of material fact to which Millner could have testified on personal knowledge, and to which he could have made affidavits fulfilling Rule 56, which would have raised a genuine issue with the facts supporting the motion for summary judgment. It would have been useless to permit him to swear to arguments and conclusions.

We hold that Millner was not prejudiced by the failure to receive a Timms notice.

ITT's Counterclaim.

The district court also granted judgment for ITT with respect to its counterclaim for reasonable attorney's fees and expenses incurred in defending the action.

31 U.S.C. § 3730(d)(4) provides:

> If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees

> and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

As stated by Judge Lee:

> In support of its assertion that Millner' s only intent is to harass ITT, ITT has provided the court with a list of Millner's previous acts against ITT:
>
> 1. After his termination, Millner picketed ITT's property for over fifteen weeks bearing a sign that stated "Vietnam Veteran Fired From Army Contract. Thank You, ITT."
>
> 2. Millner conducted a defamatory letter-writing campaign directed at United States Senators and Representatives, the President of the United States, multiple branches of the armed services including numerous Generals, Admirals, and other ranking officers, and foreign heads of state.
>
> 3. On July 30, 1991, Millner filed a baseless charge with the National Labor Relations Board alleging violation of the National Labor Relations Act.

> 4. On September 12, 1991, Millner filed a baseless charge with the Equal Employment Opportunity Commission alleging that he was the victim of reverse discrimination.
>
> 5. Finally. Millner filed the present action on January 10, 1994.

ITT also points out that Millner admitted several times in his deposition that he would continue to pursue ITT in any way he could.

Clearly, ITT has shown that since Millner's termination he has pursued a pattern of conduct calculated to harass ITT and cause it as much harm as possible. It is also clear that Millner's False Claim Act is frivolous, vexatious, and brought primarily for purposes of harassment. Therefore, this court will grant summary judgment in favor of ITT to the extent it is seeking attorney fees and expenses as permitted by § 3730(d)(4).

ITT sought summary judgment on its counterclaim, and supported its motion with evidentiary materials. Millner responded on the merits of the claim, but made no response with respect to the counterclaim. On appeal he argues that ITT should not have prevailed on the merits, but has not addressed in any other way Judge Lee's conclusion as to the counterclaim.

He has waived review and we see no need to discuss this ruling.

The judgment appealed from is affirmed.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

FILED
95 SEP 27 AM 11:09
STEPHEN R. LUDWIG,
CLERK
U S DISTRICT COURT
NORTHERN DISTRICT
OF INDIANA

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
ex rel.) CIVIL NO.
CHARLES M. MILLNER,) 1:94cv9
Relator,)
)
V.)
)
ITT AEROSPACE/)
COMMUNICATIONS)
DIVISION OF ITT)
CORPORATION,INC.,)
)
)
Defendant.)

ORDER

This matter is before the court on a motion for summary judgment filed by the defendant on August 1, 1995. The motion was fully briefed on September 26, 1995[1]. This matter was initially set for hearing, at the Relator's request. However, after a complete review of all of the materials submitted to the court, the court has determined that a hearing will not be helpful or necessary.

Summary Judgment

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to

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[1] The defendant filed its reply brief on September 15, 1995. The Relator filed a "response" to ITT's reply on September 26, 1995. Such a response is not permitted under the Local Rules of this court. See L.R. 7.1. However, as the Relator is proceeding pro se, his brief filed September 26, 1995, as well as his response to the Doerr Supp. Aff. (also filed on September 26, 1995), have been considered by this court.

any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). However, Rule 56(c) is not a requirement that the moving party negate his opponent's claim. Fitzpatrick v. Catholic Bishop of Chicago, 916 F.2d 1254, 1256 (7th Cir. 1990). Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery, against a party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and in which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The standard for granting summary judgment mirrors the directed verdict standard under Rule 50(a), which requires the court to grant a directed verdict where there can be but one reasonable conclusion. Anderson v. Liberty Lobby. Inc., 477 U.S. 242, 250 (1986). A scintilla of evidence in support of the non-moving party's position is not sufficient to successfully oppose summary judgment; "there must be evidence on which the jury could reasonably find for the plaintiff." Id.. In Re Matter of Wildman, 859 F.2d 553, 557 (7th Cir. 1988); Klein v. Ryan, 847 F.2d 368, 374 (7th Cir. 1988); Valentine v. Joliet Township High School District No. 204, 802 F.2d 981, 986 (7th Cir. 1986). No genuine issue for trial exists "where the record as a whole could not lead a rational trier of fact to find for the nonmoving party." Juarez V. Ameritech Mobile Communications. Inc., 957 F.2d 317, 322 (7th Cir. 1992) (quoting Matsushita Electric du Co. td. V. Zenith Radio Corp ., 475 U.S. 574, 586 (1986)).

Initially, Rule 56 requires the moving party to inform the court of the basis for the motion, and to identify those portions of the "pleadings, depositions, answers to interrogatories, and admission on file, together with the affidavits, if any, which demonstrate the absence of a genuine issue of material fact, Celotex, 477 U.S. at 323. The non-moving party may oppose the motion with any of the evidentiary materials listed in Rule 56(c), but reliance on the pleadings alone is not sufficient to withstand summary judgment. Goka v. Bobbitt, 862 F.2d 646, 649 (7th Cir. 1988); Guenin v. Sendra Corp., 700 F. Supp. 973, 974 (N.D. Ind. 1988); Posey v. Skyline Corp., 702 F.2d 102, 105 (7th Cir.), cert. denied, 464 U.S. 960 (1983).

So that the district court may readily determine whether genuine issues of material fact exist, under Local Rule 56.1, the moving party is obligated to file with the court a "Statement of Material Facts" supported by appropriate citation to the record to which the moving party contends no genuine issues exist. In addition, the non-movant is obligated to file with the court a "Statement of Genuine Issues" supported by appropriate citation to the record outlining all material facts to which the non-movant contends exist that must be litigated. See, Waldridge v. American Hoechst Corp. et al., 24 F.3d 918 (7th Cir. 1994). In ruling on a summary judgment motion the court accepts as true the non-moving party's evidence, draws all legitimate inferences in favor of the non-moving party, and does

not weigh the evidence or the credibility of witnesses. Anderson, 477 U.S. at 249—251, 106 S.Ct. at 2511. Furthermore, in determining the motion for summary judgment, the court will assume that the facts as claimed and supported by admissible evidence by the moving party are admitted to exist without controversy, except to the extent that such facts are controverted in the "Statement of Genuine Issues" filed in opposition to the motion. L.R. 56.1

Substantive law determines which facts are material; that is, which facts might affect the outcome of the suit under the governing law. Anderson, 477 U.S. at 248. Irrelevant or unnecessary facts do not preclude summary judgment even when they are in dispute. Id. The issue of fact must be genuine. Fed. R. Civ. P. 56(c), (e). To establish a genuine issue of fact, the non—moving party "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita, 475 U.S. at 586; First National Bank of Cicero v. Lewco Securities 860 F.2d 1407, 1411 (7th Cir. 198S). The non—moving party must come forward with specific facts showing that there is a genuine issue for trial. Id. A summary judgment determination is essentially an inquiry as to "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson, 477 U.S. at 251-252. Finally, the court notes that, "[i]t is a gratuitous cruelty to parties and their witnesses to put them through the emotional ordeal of a trial when the outcome is foreordained" and in such cases summary judgment is

appropriate. Mason v. Continental Illinois Nat'l Bank, 704 F.2d 361, 367 (7th Cir. 1983).

Discussion

The Relator, Charles 14. Millner ("Millner"), filed this action on January 10, 1994, pursuant to the qui tam provisions of the False Claims Act, 31 U.S.C. §§ 3729—33 (1988). Section 3729 of the False Claims Act provides, in relevant part, that:

> Any person who . . . knowingly presents, or causes to be presented to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval . . . is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person[.]

On May 13, 1994, pursuant to §3730(b), the United States elected not to intervene in this action. Section 3730(b) provides, in relevant part, that:

> Actions by private persons. -- (1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. . .

> (2) * * * The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.
>
> * * *
>
> (4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall --
>
> (A) proceed with the action, in which case the action shall be conducted by the Government; or
>
> (B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

Millner has brought the present action against his former employer, ITT Aerospace/Communications Division of ITT Corporation, Inc. ("ITT"), claiming that ITT has made a "false claim" to the Army.

On June 29, 1994, this court appointed Scott T. Niemann as pro bono counsel for Millner. Attorney Niemann conducted extensive discovery in this case and, on February 15, 1995, after concluding that Millner's case was "wholly lacking in merit", requested that he be

permitted to withdraw as Millner's counsel. On February 28, 1995, Magistrate Judge Roger B. Cosbey conducted a hearing on Attorney Niemann's motion to withdraw. On March 20, 1995, Magistrate Cosbey entered an order finding that Attorney Niemann had conducted "an extremely thorough and complete analysis of the Relator's claims" and permitted Attorney Niemann to withdraw from the case.

In December 1983, ITT and the United States Army entered into a contractual relationship for the design, development, testing, and production of a new military radio system to be used by Army troops, the Single Channel Ground and Airborne Radio System ("SINCGARS")[2]. Several Army personnel were resident full time at ITT's Fort Wayne Plant and had unlimited access to all ITT SINCGARS testing and production facilities[3]. Army personnel were also fully participating members of the Failure Review Board and Engineering Change Board[4]. These Boards are joint contractor/government panels which monitor design changes and testing throughout the SINCGARS project development[5].

In his complaint, Millner asserts that ITT was responsible under its contracts with the Army to develop mechanical shock absorbent mounting tray assemblies[6]

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[2] Affidavit of Douglas Doerr ("Doerr Aff.") at ¶ 2.

which would protect the communications equipment from damage from shock when installed in combat vehicles under operational conditions[7]. Millner further claims that during testing of the SINCGARS and its mounting tray it was discovered that the four shock isolators on the mounting tray assembly failed[8]. According to Millner, he and a coworker, Dan Rippe, developed a simple and inexpensive modification to the mounting tray (the "jam nut configuration") which lengthened the life of the tray and thereby lengthened the useful life of the SINCGARS[9].

Millner next claims that ITT concealed the proposed modification of the mounting tray from the Army and on September 12, 1990, accepted a contract from the Army Communications-Electronics Command ("CECOM")[10]

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[3] Doerr Aff. at ¶ 4.

[4] Id.

[5] Id.

[6] A mounting tray is a simple piece of equipment consisting essentially of two metal plates separated by four rubber shock absorbers or "shock isolators". Doerr Aff. at ¶ 6.

[7] Complaint at ¶ 9

[8] Complaint at ¶ 11.

[9] Complaint at ¶ 12.

to conduct a "mounting tray shock isolator design study" and completed the study on June 30, 1991, still without revealing the corrective modification[11] . Thus, Millner concludes that from 1987 to 1991, ITT knowingly submitted systems to the Army which failed to meet quality and shock resistance requirements of the contracts, but certified these systems as meeting contract requirements in its claims to the Army for payment under the contract[12].

Millner is seeking a judgment against ITT "in the amount of all payments received from the United States Army from 1986-1993 for defective mounting trays in an amount in excess of $3,0O0,000[13] and "for all payments received by ITT from the government for communications equipment to replace sets damaged by defective mounting trays in [sic] amount in excess of $100,000,000.[14]". Finally, Millner is seeking treble damages and costs as provided in §3729 of the False Claims Act[15].

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[10] CECOM is the Army agency responsible for, among other things, contracting for the development of communications systems, including SINCGARS. CECOM is the agency of the Army which has primary authority over the SINCGARS program. Doerr Aff. at ¶ 2.

[11] Complaint at ¶ 13.

[12] Complaint at ¶ 14.

[13] Complaint at ¶ 19.

[14] Complaint at ¶ 20.

[15] Complaint at ¶ 21.

The court would note here for the record that prior to filing this complaint with this court, Millner filed complaints directly with the Army. As a result, two agencies of the Army, the Army Criminal Investigation Command ("CID") and the Defense Contract Management Command ("DCMC") have each conducted investigations at ITT's facilities regarding Millner's allegations with respect to the mounting tray[16] The DCMC conducted a three-day on-site investigation in January 1993 and issued a report dated February 16, 1993. The report concludes:

> CECOM did not consider this [the life expectancy of the mounting tray shock absorber] to be a problem of sufficient magnitude to warrant changing the design specifications. Instead, instructions were issued to units processing this component that the shock absorbers had to be replaced on a regular basis to prevent their failure.

Bates No. 87.

In March 1992, the CID investigated Millner's allegations and concluded:

> Information was developed that although ITT Defense Corporation personnel pursued alternatives to lengthen the life expectancy of this part, no viable solution was found and the government did not consider this to be a problem warranting a change in design specifications.

Bates No. 263.

For purposes of further background information, the court will next discuss the various vibration testing that ITT subjected the SINCGARS system to. The purpose of vibration testing is to simulate the vibration stresses experienced by the SINCGARS system in the field and under combat conditions[17]. When ITT and the Army entered into negotiations and a contractual relationship for the design and development of the SINCGARS system, the conventional vibration testing which the Army required of military hardware was sine vibration testing [18]. Thus, ITT designed the SINCGARS system to withstand the stresses of sine vibration testing[19].

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[16] Doerr Aff. at ¶ 14.

In 1986, after ITT had designed the SINCGARS system to pass sine vibration testing requirements, the Army wanted to modify the SINCGARS contract to require random vibration testing, which the Army felt more accurately simulated field and combat conditions[20]. ITT was unsure of how well the SINCGARS system would withstand random vibration testing, and was concerned that the system would have to be partially or completely redesigned, leading to new or increased costs to develop and produce the SINCGARS system[21]. The SINCGARS contract was a fixed-price contract, making any cost increase a subject of negotiation between ITT and the Army[22]. To determine the impact, both from a design and performance standpoint and from a cost standpoint, of a change from sine to random vibration testing, ITT tested the SINCGARS system using the Army's proposed new random vibration testing requirements[23]. ITT performed this testing in 1986 and 1987 before it agreed to modify the contract to substitute random vibration testing for sine vibration

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17 Doerr Supp. Aff. at ¶ 4.

18 Id.

19 Id.

20 Doerr Supp. Aff. at ¶ 5.

21 Id.

22 Doerr Supp. Aff. at ¶ ¶ 5, 16.

testing[24]. Random vibration testing, including the length of test time and the change out of mounting trays[25], did not become a part of the SINCGARS contract until the Contract Rebaseline Modification was executed on November 20, 1987[26].

In support of its motion for summary judgment, ITT strongly and steadfastly claims that there was no act of concealment with respect to its contract with the Army. ITT admits that Rippe and Millner devised a proposed improvement to the mounting tray shock isolators, but argues that it did not conceal this proposed improvement. In fact, ITT argues that it is undisputed that ITT presented the Rippe/Millner idea to the Army in September 1989 as part of a comprehensive list of suggested changes in the SINCGARS contract. According to ITT, the Army simply rejected the idea and the proposed improvement never became part of the contract between ITT and the Army. ITT further asserts that the

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[23] Doerr Supp. Aff. at ¶ 5.

[24] Doerr Supp. Aff. at ¶ 7.

[25] ITT had implemented a change in the testing procedure in 1987 which allowed the shock isolators on the mounting tray to be changed out every two hours during the production reliability acceptance tests.

[26] Doerr Supp. Aff. at ¶ 11; Bates No. J83-J84.

improvement to the shock isolators was not necessary as the Army had not reported any field failure of the SINCGARS attributable to failure of the shock isolators.

As ITT correctly points out, to prove that ITT is liable to the Army under the False Claims Act, Millner must prove that ITT knowingly submitted a false claim or made false statements them to be false. United States ex rel. Hagood v. Sonoma County Water Agency, 929 F.2d 1416, 1421 (9th Cir. 1991). ITT also takes the position that Millner must establish four elements to prevail in this action:

> (1) that ITT presented or caused to be presented to an agent of the United States a claim for payment;
>
> (2) that the claim was false or fraudulent;
>
> (3) that ITT knew the claim was false or fraudulent; and
>
> (4) that the United States suffered damages as a result of the false or fraudulent claim.

ITT has cited Young-Montenay Inc. v. United States, 15 F.3d 1040, 1043 (Fed. Cir. 1994), which in turn cites Miller v. United States 550 F.2d 17, 23 (Ct. Cl. 1977), in support of its position.

The United States has filed an amicus curiae brief in which it takes the position that ITT has incorrectly argued that Millner is required to establish that the United States suffered damages as a result of the false or fraudulent claim. The United States argues that the plain language of the False Claims Act specifies that the plaintiff or relator, under any circumstances, is entitled to a penalty of between $5,000 and $10,000 for every false claim or statement proven, plus any damages proven. 31 U.S.C. §3729(a).

A review of the case law reveals that Young-Montenay, supra, did in fact state that damages to the United States must be proven. However, Miller, supra, the case cited for this proposition, does not hold that damages must be proven. Rather, as the government argues, the statute and the case law clearly indicate that damages need not be shown in order to recover the civil penalty under the False Claims Act. Rex Trailer Co. v. United States, 76 5. Ct. 219 (1956); Hagood, supra; United States v. Kensington Hosp., 760 F. Supp. 1120 (E.D. Pa. 1991). Thus, this court will not require Millner to meet part four of the test discussed above.

Nevertheless, ITT has argued that Millner cannot meet parts two and three of the test. Specifically, ITT claims that there were no false or fraudulent claims made to the Army as the Army had full knowledge of the jam nut configuration as a proposed solution to the shock isolator problem. According to ITT's evidence,

ITT and the Army contracted for a Preplanned Product Improvement Study ("P31") in 1988[27]. The purpose of this study was to assess a variety of potentially problematic aspects of the SINCGARS system, one of which was the mounting tray shock isolators[28]. With respect to the shock isolators, the September 15, 1989, P31 Final Study Report prepared by ITT for CECOM states:

> Two solutions have been identified that will correct the inadvertent rotation of the mounting stud. The first solution utilizes Grade A Loctite to secure the mounting stud to the shock isolator. The second solution incorporates a longer mounting stud and a jam nut.
>
> Using Grade A Loctite will increase the retention of the mounting stud/pedestal threaded interface over the currently—used Grade H Loctite. The Grade A Loctite will also, however, complicate the rework problems of removing the mounting stud from the shock isolator.

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[27] Doerr Aff. at ¶ 8.

[28] Id.

> A longer mounting stud can be installed into the isolator and a jam nut can be secured onto the mounting stud from the backside of the isolator. The use of the longer stud and jam nut eliminates both the need for Loctite and the rework problems associated with the disassembly of the mounting stud from the isolator assembly.

Doerr Aff at ¶ 9 and Ex. "A" to Doerr Aff., Bates Nos. J121-J157, at J151.

The P31 Study's "Conclusions and Recommendations" section stated that:

> Results of this study indicate that a significant cost reduction and increased mechanical integrity can be accomplished for the SINCGARS mounting tray. The new design will eliminate the corrosion, manufacturing and performance problems that affect current mounting tray design.
>
> Based on the above conclusions, it is recommended that ITT-A/OD and the Army redesign the mounting tray. A parallel design approach that evaluates multiple materials (cast aluminum and plastic) should be implemented.

Bates No. J155.

ITT also points out that as early as February 19, 1990, William Newell, the contracting officer, had (as a result of the P31 Study) requested that ITT generate Engineering Change Proposals ("ECP") for three improvements, the first of which was:

> Product Improvement No. 4, Mounting Tray, paragraph 3.2 entitled "shock isolator." An ECP is required to incorporate a longer mounting stud and jam nut on the isolator to improve the mounting tray's vibration performance. Cut-in to production is desired as soon as possible.
>
> * * *
>
> It is requested that concurrent with the submission of the above ECP's, ITT provide this office with a firm fixed price proposal to incorporate this effort into the SINCGARS Ground contract.
>
> * * *
>
> This letter is only a request for proposal and in no way authorizes the contractor to begin work on this effort. This letter shall not be construed as authorizing an increase in contract price, nor shall it relieve the contractor from any of the terms or conditions of the contract.

Bates No. J212-J213.

ITT argues that the Army was obviously aware of the jam nut configuration as a proposed solution as early as February 1990, as the Army could not have requested an Engineering Change Proposal for a modification of which it was unaware.

Although Millner is obviously of the belief that the jam nut configuration was not incorporated into the mounting tray design because ITT concealed this improvement from the Army, according to ITT the Army simply rejected the jam nut configuration. To support this assertion, ITT has provided the court with the deposition testimony of Robert Fabish, a former SINCGARS Program Manager. Referring to a handwritten note dated February 10, 1992 appended to a Failure Review Board Submittal Memorandum[29], Fabish indicated that the government made the ultimate decision not to incorporate the jam nut configuration[30].

In light of all of the above evidence, ITT concludes that the Army's knowledge and rejection of the jam nut configuration bars Millner's action under the False Claims Act. ITT insists that it performed its contract exactly in conformance with the requirements of the contract, which contract reflected the Army's decision to retain the original mounting tray design.

ITT further argues that, even assuming that Millner is right and that the SINCGARS system would be a better, more reliable radio with a vastly increased life span with the jam nut configuration, Millner's False Claims Act action still fails. As the Ninth Circuit stated in Wang v. FMC Corp., 975 F.2d 1412, 1421 (9th Cir. 1992):

> Without more, the common failings of engineers and other scientists are not culpable under the (False Claims] Act.
>
> [This] case betrays a serious misunderstanding of the Act's purpose. the weakest account of the Act's "requisite intent" is the "knowing presentation of what is known to be false." The phrase "known to be false" in that sentence does not mean "scientifically untrue"; it means, "a lie." The Act is concerned with ferreting out "wrong doing," not scientific errors. What is false as a matter of science is not, by that very fact, wrong as a matter of morals. The Act would not, put either Ptolemy or Copernicus on trial.

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[29] Fabish Dep. Ex. 17. Exhibit 17 reads: "Gov't has decided that a redesign or change in isolators is not warranted. They are going to buy per dwg pkg [drawing package]. Bob Fabish. 2/10/92."

[30] Fabish Dep. at 34:19 — 35:8.

See also United States ex rel. Anderson v. Northern Telecom, Inc., 52 F.3d 810, 815-16 (9th Cir. 1995). Thus, according to ITT, the fact that ITT and the Army did not agree to incorporate the jam nut configuration into the SINCGARS contract, even if doing so would have improved the SINCGARS system, does not give Millner a cause of action under the False Claims Act.

Millner filed a 25-page response to ITT's motion for summary judgment on August 25, 1995. Millner also filed a "response" to each of ITT's affidavits filed in support of its motion for summary judgment[31]. The filing of "responses" to affidavits is not sufficient under Rule 56 to defeat summary judgment. Rather, affidavits must be rebutted by evidence, which may include countering affidavits. For the most part, Millner's "responses" consist of arguments that he does not believe the information in the affidavits. To the extent that supporting evidence is lacking, Millner's arguments are insuff4.cient to create a genuine issue of material fact.

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[31] As ITT has pointed out, the filing of these responses (which total 52 pages) is in violation of this court's briefing limitations. See Order of August 7, 1995 and Local Rule 7.1(b).

In his responsive brief, Millner does not address ITT's arguments and evidence that the Army knew of the jam nut configuration but ultimately rejected the idea. Millner now focuses his arguments on his allegations that ITT concealed the jam nut configuration from the Army for several years in order to win contracts for further study[32]. Millner also claims that ITT would not disclose the jam nut configuration to the Army because ITT had the Army convinced they did not have a solution, and to later disclose that a simple solution had been discovered would have been embarrassing to ITT. In support of this latter assertion, Millner relies on inadmissible triple hearsay. Specifically, Millner alleges that Rippe told him that Kammer told Rippe that it would be embarrassing to disclose the proposed solution[33]. Rippe, however, stated in his deposition that he was told to drop the matter because there was no bad field experience which would justify the cost of proposing the jam nut configuration as a solution to the shock isolator problem[34].

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[32] ITT claims that Millner has abandoned his original claims and has now improperly asserted claims not included in his complaint. A review of Millner's complaint reveals that in Paragraph 13, Millner alleges that ITT improperly accepted a contract in 1990 to study the problems with the mounting tray. Thus, at least some of Millner's arguments are based on allegations in his complaint. In any event, as ITT has fully responded to Millner's claims, this court will likewise address all of the issues raised in Millner's response brief.

[33] Millner Dep. at 38:3 — 39:6.

[34] Rippe Dep. at 20:12 — 21:4.

Millner has contended that ITT wrongfully requested funds to perform both the P3I Study and a later study known as the Taguchi Study. As noted above, ITT and the Army contracted for the P3I Study in 1988, and ITT submitted a P3I Final Study Report on September 15, 1989. Millner claims, in essence, that the Army would not have awarded the contract for the P31 Study had it known of the jam nut configuration. In his response, Millner claims that the jam nut configuration was a proven solution. In support of this claim, Millner directs the court to an internal memo from Dan Rippe to J. Kopson (dated September 1, 1987), in which Rippe discusses two methods of extending shock isolator life:

> The second method is to change the assembly method of the shocks. The new method would be to use a longer center bolt (new: 1/4 - 20 x 1.000) and jam nut combination. With this method, loctite (grade A) would be applied only to the jam nut threads leaving t' threads inside the pedestal section clean. Repairability now entails using a standard wrench or socket to remove the loctited jam nut and then a standard Allen wrench to remove the bolt from the shock.

> In conclusion, the current assembly process is insufficient for proper isolator life during multi-axial random vibration. The life and repairability of the isolators can be maximized by a simple change in the assembly process. Both options discussed above have been proven through 36 hours of random vibration. A cost analysis was done on the second method and is submitted with this memo.

Bates No. J107.

It is important to note here that Millner has admitted in his deposition that the jam nut configuration was not a fully tested idea at this point. In fact, Millner's own testing revealed that the jam nut configuration had serious problems. The pertinent portions of Millner's deposition testimony is as follows:

Q: Did you ever do any ballistic shock testing on (the jam nut configuration)?

A: Yes.

Q: What do you believe the results of the ballistic shock tests were?

A: The results show -- I can't remember how many drops we did. We may have only did

[sic] a couple of drops. It indicated the top of the jam nut came in contact with the top -- I believe it was the top metal tray. The mounting tray, basically, two metal sheets separated by the four shock isolators, and the jam nut which is on top of the main bolt came in contact with the metal of the top tray.

Q: So you got metal—to-metal contact?

A: Yes.

Q: Is that something that is good or bad or indifferent in a radio?

A: Well, I would say it was not good.

Q: What would you have had to have done to have eliminated that metal-to-metal contact with the jam nut solution?

A: What we could have done was probably maybe a thinner jam nut, or it might have turned out that was a benefit because that would have prevented the movement of the shock isolator. .

Q: Would it be fair to say you never got that far in the testing?

A: Correct. Millner Dep. at 60:3 — 61:7.

Likewise, Rippe testified that the jam nut configuration needed further testing before the idea could actually be implemented:

Q: What was the subject of that, what you called the final meeting[35]?

A: I basically was asking Dale if we wanted to pursue any engineering change notification to implement any of the ideas that had been discussed through Exhibits 4, 5, and 6, and in response to that, Dale, who was not in a position to say go ahead and spend funds to implement the change, got basically Jack Kopson and Don Kammer together, the four of us, to discuss what to do with this information.

Q: And what was the substance of that discussion in that meeting?

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[35] Rippe indicated that he could not remember the exact date of this meeting, but estimated that it was sometime during the first half of 1988. Rippe Dep. at 19:16.

A: Do we want to go forward and do some more testing possibly and look at implementing this idea.

Q: And what was the response?

A: Well, the first and foremost response was how do we justify the change, and the main question was whether there were really any field failures that would require us to make a design change, why do we feel that it's inefficient.

Rippe Dep. at 19:17 - 20:11 (emphasis added).

In light of this deposition testimony, it is clear that Millner's allegation that ITT was aware of a completely feasible and dependable solution to the shock isolator problem before accepting the contract for the P3I Study in 1988 is completely unsupported by any evidence. Additionally, as noted infra, the P3I Study addressed many issues and did not focus on the shock isolator problem. Thus, even if ITT had informed the Army of the jam nut configuration as a proposed solution to the shock isolator problem in 1987, when Rippe and Millner first hatched the idea, the 1988 P3I Study would still have been necessary. After months of discovery, Millner has not presented any evidence to the contrary and, in particular, has not shown that even one person has come to the conclusion that the jam nut configuration should have been disclosed to the Army earlier than it was.

Even though the evidence clearly shows that the jam nut configuration was disclosed to the Army in the P3I Study Final Report on September 15, 1989, Millner has alleged that ITT continued to conceal the jam nut configuration from the Army in order to obtain funding for another study. A few pertinent background facts are as follows. On April 24, 1990, following the P3I Study and the Army's request to submit an ECP for the jam nut configuration, ITT decided it did not want to implement the jam nut configuration on a fixed price basis[36]. Thus, on June 12, 1990, CECOM requested that ITT submit a bid for another design study of the entire mounting tray[37]. On July 3, 1990, ITT submitted a bid of $48,481 to do the study of the mounting tray[38]. On June 30, 1991, ITT issued a Final Design Study Report, which became known as the Taguchi Study Report. The Taguchi Study concluded that a stiffer mounting tray and utilization of a different brand of shock isolator provided optimum mounting tray performance[39]. The mounting tray design study addressed several issues relating to the mounting

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[36] See Bates No. J223.

[37] See Bates No. J227-J228.

[38] See Bates No. J229-J239.

[39] Doerr Supp. Aff. at ¶ 15; Bates No. J2538.

tray, including use of alternative shock isolators, different loading conditions imposed on the mounting tray, structural integrity of the mounting tray from a durability standpoint, investigation of possible new materials for the mounting tray, metallurgical implications of different welding steps, verification of the shock isolator mounting design proposed in the P31 Study (the jam nut configuration), and the determination of the shock isolator field replacement schedule[40]. ITT ultimately concluded that the mounting tray failures were caused by problems with parts supplied by a vendor[41].

ITT has also taken the alternative position that, even accepting as true everything that Millner alleges, Millner has not asserted a claim for relief under the False Claims Act, because there is simply no evidence of a false claim. According to ITT, for there to have been a false claim in this case, Millner must show that there was some sort of defect in the shock isolator, in the practical sense, that needed improving. ITT points out that the report submitted by Dan Rippe on September 1, 1987, was based on Rippe's design margin testing of the shock isolators[42]. ITT points out that the purpose of a design margin test is to take the established design and test it to see how much (if at all), the established design

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[40] Doerr Supp. Aff. at ¶ 15; Bates No. J228; Bates No. J2525.

[41] Doerr Supp. Aff. at ¶ 15.

[42] Doerr Supp. Aff. ¶ 6.a.

exceed the specifications[43]. Thus, a design margin test is run until the part or system under testing fails, and to say that a component fails during a design margin test is to say only that the test worked. ITT argues that when Rippe reported in his design margin test that the shock isolators failed, Rippe was only stating that the design margin test worked and not that the shock isolators were defective. ITT claims that Millner is simply arguing that ITT had a way to increase the design margin of the shock isolators and, even if true, that does not make the original design defective. ITT acknowledges that in an engineering sense it may be better to have a 500% design margin than a 400% design margin, but states that until and unless the existing design is proven to be defective, the Army (and the taxpayers) are within their rights to insist upon the use of the current design.

Millner has claimed that the shock isolators were defective. However, as ITT states, there is no evidence supporting this claim. Although the shock isolators did fail in testing at some point, there is no evidence that the shock isolators did not meet the final requirements as per the final SINCGARS contract. Rather the evidence shows that the Army had used the current design for 20 years and had never experience a field failure of the shock isolators. Affidavit of Robert Jones, Sr. at ¶¶ 7, 8, 10.

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[43] Id.

In his response to the Jones Affidavit, Millner claims that many of the reported field failures of the SINCGARS system, as detailed in documentation attached to the Jones Affidavit, were caused by broken pins, etc., which Millner attributes to vibrations transmitted to the system. Millner further claims that if the shock isolators were doing their job, these other causes of field failures would have been eliminated. Millner's argument fails for several obvious reasons. First, Millner has no evidence, other than his own speculations, to connect the failed radio to shock isolator failures. According to Jones, whose job is specifically to collect and maintain field failure data for all technical aspects of the SINCGARS system, the shock isolators in the failed systems had not failed, nor caused the failure of the system.

Second, even if some of the failures were caused by vibration, it has never been suggested that the shock isolators were supposed to prevent all vibration from being transmitted to the radio. Rather, common sense dictates that all of the radios will experience some vibration and thus if any part of a radio has a weakness, this limited vibration would likely cause it to fail. Finally, it is worth noting that machinery, even sophisticated radios, may sometimes be subjected to stresses not contemplated by manufacturers, such as whacks on the side when unresponsive. Thus, this court finds that Millner's unsupported argument that some of the reported field failures were necessarily caused by failures of the shock isolators is without merit.

This court has carefully studied all of the evidence in this case and finds that summary judgment should be granted in favor of ITT. This court finds that each of Millner's asserted claims are unsupported by admissible evidence. The unrebutted evidence clearly shows that at the time Rippe disclosed the jam nut configuration in 1987, the idea was still not completely tested. The evidence further shows that, after performing testing, ITT disclosed the jam nut configuration to the Army on June 30, 1991, as part of the P31 Study results. Additionally, it is clear that the shock isolator problem was only one of many problems studied at that time. Millner has not submitted any evidence that the Army would not have ordered the P31 Study had it known of the jam nut configuration in 1987. Millner has also failed to show that any other person has held the belief that the jam nut configuration should have been disclosed sooner.

Further, Millner has failed to show that funds for the Taguchi Study were granted to ITT as the result of concealment of the jam nut configuration. The evidence clearly shows that the Army knew of the jam nut configuration before it ordered the study. And, as with the P31 Study, the Taguchi Study dealt with many issues and did not focus on the shock isolator problem. In fact, the Study concluded that the problems with the mounting tray were caused by substandard parts supplied by a vendor.

This court further finds that Millner's claims under the False Claim Act fail because, even if ITT had concealed the jam nut configuration, they had no duty to disclose it in the first place. The unrebutted evidence clearly shows that the Army was not experiencing field failures of the shock isolators. The only thing ITT was required to do was to meet its contract requirements, and Millner has not presented any evidence showing that the final contract required more than what ITT provided.

Consequently, this court will grant summary judgment in favor of ITT on Millner's claims against it.

The court will now address ITT's request for summary judgment on its counterclaim against Millner, which request was included in its initial brief filed August 1, 1995. ITT filed its counterclaim, along with its answer to Millner's complaint, on October 26, 1994. The docket in this case does not reflect any answer by Millner to ITT's counterclaim. Likewise, although Millner has submitted over 100 pages of briefing in connection with ITT's motion, Millner has completely failed to make any response to ITT's request for summary judgment on is counterclaim.

ITT has filed its counterclaim pursuant to 31 U.S.C. 13730(d) (4) which provides that:

> If the Government does not proceed with the action and the person bringing the action conducts the action, the court may

> award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

ITT claims that Millner's claim under the False Claims Act is merely the latest tactic Millner has used to harass ITT since Millner was discharged from his employment with ITT on June 19, 1991.

In support of its assertion that Millner's only intent is to harass ITT, ITT has provided the court with a list of Millner's previous acts against ITT:

> 1. After his termination, Millner picketed ITT's property for over fifteen weeks bearing a sign that stated "Vietnam Veteran Fired From Army Contract. Thank You, ITT."[44]

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[44] Affidavit of Les Sackett at ¶ 7.

2. Millner conducted a defamatory letter-writing campaign[45] directed at United States Senators and Representatives, the President of the United States, multiple branches of the armed services including numerous Generals, Admirals, and other ranking officers, and foreign heads of state.

3. On July 30, 1991, Millner filed a baseless charge with the National Labor Relations Board alleging violation of the National Labor Relations Act.

4. On September 12, 1991, Millner filed a baseless charge with the Equal Employment Opportunity Commission alleging that he was the victim of reverse discrimination.

5. Finally, Millner filed the present action on January 10, 1994.

ITT also points out that Millner admitted several times in his deposition that he would continue to pursue ITT in any way he could[46].

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[45] By his own estimation, Millner has written "800 to 1000" letters. Millner Dep. 141:112 - 16.

[46] Millner Dep at 109:12—23 and at 137:10—20.

Clearly, ITT has shown that since Millner's termination he has pursued a pattern of conduct calculated to harass ITT and cause it as much harm as possible. It is also clear that Millner's False Claim Act is frivolous, vexatious, and brought primarily for purposes of harassment. Therefore, this court will grant summary judgment in favor of ITT to the extent it is seeking attorney fees and expenses as permitted by §3730(d) (4).

In its counterclaim (but not in its motion for summary judgment), ITT has requested that the court "[a] ward ITT its costs and expenses in responding to the frivolous and harassing charges, letters and claims of Millner." As these costs and expenses are not permitted to be recovered pursuant to §3730 (d) (4), this court does not have jurisdiction to consider awarding such costs and expenses. Rather, ITT should pursue recovery of these items through some other avenue. Consequently, this court will dismiss this portion of ITT's counterclaim without prejudice.

Finally, the court will address ITT's request for a permanent injunction. This request is not part of ITT's counterclaim and is first raised in its brief in support of its motion for summary judgment. ITT has requested a permanent injunction "barring Millner forever from asserting any claims whatsoever against ITT for any actions or occurrences prior to the date of the Court's Order on this Motion and award ITT its costs and fees incurred in defending this action."

Although ITT has cited cases for the proposition that the court has discretion when deciding a request for a permanent injunction, ITT has not cited any authority that would permit this court to grant an injunction of the type requested under the present circumstances. While the court may have discretion in such matters, there still has to be some basis for exercising this discretion. In the present case, there is simply no legal basis for this court to grant the requested injunction. If Millner continues to harass ITT, ITT clearly has the resources and the evidence to pursue a state court action against Millner. Consequently, ITT's request for a permanent injunction will be denied.

Conclusion

For all of the forgoing reasons, ITT's motion for summary judgment is hereby GRANTED with respect to all of Millner's claims against ITT.

Further, ITT's motion for summary judgment is hereby GRANTED with respect to ITT's counterclaim against Millner to the extent that ITT is seeking to recover its reasonable attorney fees and expenses incurred in defending the present action. The remainder of ITT's counterclaim, which requests recovery of costs and expenses incurred as a result of defending against

Millner's other acts of harassment, is hereby DISMISSED WITHOUT PREJUDICE. ITT shall submit to the court its request for fees and expenses incurred in defending the present action within 30 days. Millner may respond within 30 days thereafter.

Finally, ITT's request for a permanent injunction is hereby DENIED.

Enter: September 27, 1995

"s/ William C. Lee"
William C. Lee, Judge
United States District Court

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Decided August 21, 1997

Before

Hon. THOMAS E. FAIRCHILD, Circuit Judge

Hon. WILLIAM J. BAUER, Circuit Judge

Hon. JOHN L. COFFEY, Circuit Judge

CHARLES M. MILLNER,	) Appeal from the United
	) States District
Plaintiff-Appellant,	) Court for the Northern
	) District of
	) Indiana, Fort Wayne
	) Division.
No. *95-3545*	)
	) No. 94C9
	)
ITT AEROSPACE/	)
COMMUNICATIONS	) William C. Lee, *Judge.*
DIVISION OF ITT	)
CORPORATION,	)
INCORPORATED,	)
Defendant- Appellee.	)

ORDER

On August 4, 1997, plaintiff-appellant filed a petition for rehearing with suggestion for rehearing *in banc*. All the judges on the original panel have voted to deny the petition and none of the active judges has requested a vote on the suggestion for rehearing in *banc*.

The petition for rehearing is therefore DENIED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

FILED
95 NOV-3 PM 1:26
STEPHEN R. LUDWIG,
CLERK
U S DISTRICT COURT
NORTHERN DISTRICT
OF INDIANA

UNITED STATES OF AMERICA, Plaintiff, ex rel. CHARLES M. MILLNER, Relator, V. ITT AEROSPACE/ COMMUNICATIONS DIVISION OF ITT CORPORATION,INC., Defendant.	) CIVIL NO.) 1:94cv9

ORDER

This matter is before the court on a motion to reconsider filed by the relator, Charles M. Millner ("Millner"), on October 10, 1995. The parties completed briefing the motion on October 30, 1995. For the following reasons, the motion to reconsider will be denied.

Discussion

Millner initiated this lawsuit on January 10, 1994, pursuant to the qui tam provisions of the False Claims Act, 31 U.S.C. §§3729-33 (1988). In his lawsuit, Millner alleged that the defendant, ITT Aerospace/Communications Division of ITT ("ITT"), had knowingly presented false claims to the Army, in connection with a defense contract. The Army's contract with ITT concerned the design, development, testing, and production of a new military radio system to be used by Army troops, the Single Channel Ground and Airborne Radio System ("SINCGARS). On September 27, 1995, this court entered an order granting summary judgment in favor of ITT. In this order, this court held that Millner's claims under the False Claims Act were unsupported by admissible evidence. On October 10, 1995, Millner filed a 96-page motion to reconsider. This motion is essentially a review of all of Millner's original arguments.

Millner, a former employee of ITT, claims to have invented an improvement to the SINCGARS mounting tray that, if implemented, would increase the life-span of the SINCGARS system thereby saving the Army lots of money. Millner claims that ITT refused to disclose the suggested improvement to the Army until after performing expensive studies. However, the evidence presented to this court in support of ITT's motion for summary judgment conclusively showed that ITT informed the Army of Millner's suggested improvement and the Army ultimately rejected the improvement.

Millner, in his motion to reconsider, repeats his arguments that the shock isolators on the SINCGARS mounting tray are defective and that his invention was a proven solution to the problem. Millner, however, continues to ignore the evidence that the Army simply decided not to implement Millner's suggested improvement, which had not been fully tested and, thus, the improvement never became part of the contract with ITT.

As ITT points out, Millner has simply refused to believe that the Army, after considering the field performance of the SINCGA.RS system, decided that it did not need to improve the shock isolators on the mounting tray. Millner also continues to argue that the Army should have implemented his suggested improvement in order to save money, and possibly lives.

However, Millner's argument is irrelevant to the issues in this case. ITT could not have forced the improvement on the Army, even if ITT had believed the suggested improvement was necessary to the performance of the mounting tray. It is clear in this case that ITT and the Army discussed implementing Millner's suggested improvement, but the improvement simply never became part of the contact. Consequently, this court repeats its earlier holding that Millner has not presented admissible evidence that ITT submitted a false claim to the Army.

Accordingly, Millners motion to reconsider is hereby DENIED.

Enter: November 3, 1995.

"s/ William C. Lee"
William C. Lee, Judge
United States District Court